International Brotherhood of Electrical Workers, Local 494; International Brotherhood of Electrical Workers, Sixth District *and* Joseph G. Podewils *and* Gerald Nell, Inc. Cases 30–CB–4127 and 30–CB–4128

October 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On July 30, 1999, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel, the Charging Parties, and Respondent IBEW Local 494 filed exceptions and supporting briefs, and the Respondents and the Charging Parties filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that Respondent IBEW Local 494 (Local 494) violated Section 8(b)(1)(B) of the Act by restraining and coercing an employer, Gerald Nell, Inc. (Nell), in the selection of its representatives for the purposes of collective bargaining and grievance adjustment by processing union disciplinary charges against Charging Party Joseph Podewils, and, by disciplining Podewils through the levying of a fine against him.[2] For the reasons below, we reverse and find that Local 494 did not violate Section 8(b)(1)(B).

In October 1997[3] Nell, a nonunion electrical contractor, hired Podewils as its electrical division manager. Although he was informed by Nell that he would have to resign his union membership in Local 494, Podewils failed to take adequate steps to effectuate his resignation.[4]

On December 1, Local 494 business representative, Leon Burzynski, appeared at the offices of Nell after receiving a tip that Podewils was employed by a nonunion contractor. During a brief conversation with Podewils, Burzynski asked "what would be the opportunity of [Podewils] working to organize the company." Podewils replied, "that wouldn't happen here . . . that wouldn't be an option." Burzynski then gave Podewils his business card with his home telephone number written on the back, but, made no further contact with Podewils. Thereafter, Local 494 made no efforts to circulate authorization cards to any employees of Nell; it did not engage in any picketing or handbilling of Nell; nor did it make any efforts of any kind to establish a collective-bargaining relationship with Nell.

On December 15, Burzynski filed intraunion disciplinary charges against Podewils alleging that Podewils was working for a nonunion company, contrary to the obligations of Local 494 members under the provisions of the union's constitution. On February 24, 1998, Local 494 found Podewils guilty of violating the union's constitution and fined Podewils $100,000. Thereafter, on appeal, the fine was reduced by the International Union to $10,000.

Section 8(b)(1)(B) provides that it shall be an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances. In *NLRB v. Electrical Workers IBEW Local 340 (Royal Electric),* 481 U.S. 573, 591 (1987), the Supreme Court reaffirmed the principle that Section 8(b)(1)(B) was intended primarily to prevent a union that is engaged in a long-term bargaining relationship with an employer from dictating the latter's choice of collective bargaining or grievance representatives, or the form that such representation will take.

It follows, therefore, that to violate Section 8(b)(1)(B) a union must, at a minimum, either have a collective-bargaining relationship with an employer, or at least be seeking to have such a relationship. As the Court explained in *Royal Electric*, a union has no incentive to affect a supervisor-member's performance of collective-bargaining or grievance adjustment duties, or to influence an employer's choice of representative, in the absence of either a collective-bargaining relationship or a desire to establish such a relationship. Id. at 590.

The Board has recognized that the requirement that a union must be "seeking" a collective-bargaining relationship (when no on-going collective-bargaining relationship exists) is to be interpreted narrowly. See *Carpenters District Council of Dayton (Concourse Construction Co.*), 296 NLRB 492, 493 (1989). Further, "[t]here must

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge dismissed an allegation that Respondent International Union violated Sec. 8(b)(1)(B).

[3] All dates are in 1997 unless noted otherwise.

[4] As the judge found, Podewils' efforts to resign his union membership were insufficient to constitute an effective resignation. Accordingly, we adopt the judge's dismissal of the 8(b)(1)(A) allegations that the Respondents disciplined Podewils when he was no longer a union member.

be evidence not only of an actual intent to seek recognition, but the union must currently be seeking recognition." Id. at 493. In the present case, we find that the evidence is insufficient to establish that Local 494 was actively seeking a bargaining relationship within the meaning of *Royal Electric*.

As noted, Local 494 engaged in no overt organizational or recognitional activity—no solicitation of authorization cards, no picketing or handbilling, and made no demand for recognition.[5] This leaves only Burzynski's inquiry to Podewils about the possible "opportunity" of organizing, which Podewils, in response, immediately dismissed out of hand. We find that this inquiry, standing alone, falls short of the kind of concrete evidence necessary to show that a union is currently and actually seeking to establish a collective-bargaining relationship under *Royal Electric*. Put another way, Burzynski's inquiry is simply too preliminary and attenuated in character, in the absence of other evidence, to warrant an inference that the discipline imposed on Podewils would affect, or was intended to affect, the manner in which Podewils performed collective-bargaining or grievance adjustment duties.[6]

As the Supreme Court noted in *Royal Electric*, Section 8(b)(1)(B) is not intended to prevent enforcement of union rules that have only the incidental effect of making a supervisory position less desirable. Because Podewils retained his union membership while serving as an 8(b)(1)(B) representative for Nell, he incurred obligations to both the Union and the Employer. As the Court explained in *Royal*, an employer is not coerced in the selection of its representatives merely because a supervisor—member having dual loyalties may find the supervisory position less desirable when faced with the uniform enforcement of legitimate union rules. 481 U.S. at 591–595.

Our dissenting colleague contends that the Union's "real intent" when disciplining Podewils was to pressure him to organize for the Union and that this serves to establish that the Union was actively seeking a bargaining relationship. But, as the dissent itself points out, Burzynski, when speaking to Podewils, did not link any reference to "organizing," or a refusal to organize, to impending discipline. Thus, there was no hint of retaliation when the reference to organizing was made.

Further, contrary to the dissent, we draw no inference of an improper retaliatory purpose simply because Burzynski elected to verify union member Podewils' employment with a nonunion employer by a personal visit rather than by a telephone call, nor do we draw such an inference because Burzynski left a business card that included his written home telephone number. In our view, this conduct is consistent with Burzynski's responsibility as a business representative to communicate with constituent members, such as Podewils, and to investigate possible violations of union rules as occurred here by virtue of Podewils' employment with a nonunion employer.

Finally, as noted above, *Royal Electric* calls for a restrictive and narrow interpretation of the "seeking a collective-bargaining relationship" requirement under Section 8(b)(1)(B). To that end, and in the absence of any overt organizational or recognitional activities by the Union here, we discern no persuasive basis to broadly infer such a purpose in this case, as does our dissenting colleague, solely on the basis of the preliminary and vague inquiry made by Burzynski about the possibility of organizing or by his conduct accompanying the inquiry.

Accordingly, we find that the Respondents did not violate the Act, and we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER HURTGEN, dissenting in part.

Unlike my colleagues, I would affirm the judge's finding that Respondent Local 494 violated Section 8(b)(1)(B) of the Act. My colleagues do not dispute the judge's finding that Charging Party Podewils was engaged in 8(b)(1)(B) activities. They dismiss the 8(b)(1)(B) allegation primarily because they find that the evidence is insufficient to establish that Local 494 was seeking a bargaining relationship with Nell. I disagree.

The facts are that Respondent's (Local 494) business representative, Burzynski, asked Employer Manager Podewils to assist Respondent in seeking to organize the Employer. Podewils responded that he would not do so.

[5] For these reasons, the present case is distinguishable from *Electrical Workers IBEW Local 1547 (Veco, Inc.)*, 300 NLRB 1065 (1990), enfd. 971 F.2d 1435 (9th Cir. 1992). There, the Union admitted that it was "presently trying to organize" the Employer and the Union's desire for a collective-bargaining relationship was overtly manifested in activities such as gathering unit employees' names and attempting to speak with them.

[6] In finding that Burzynski's inquiry sufficed to establish that Local 494 had a concrete interest in representing the Employer's employees, the judge relied on *Plumbers Local 597 (Songer Corp.)*, 308 NLRB 733 (1992). In that case, however, the Board found, as we do here, that the evidence failed to show a current recognitional objective. Nor in our view is the requisite current and active recognitional intent established by Burzynski's testimony that, if the Employer were organized, he would not have filed charges against Podewils. Without more, that testimony has an obvious and entirely lawful meaning, namely, that Podewils would not be violating the Union's lawful rules against working for nonunion employers if his employer were unionized. Accordingly, that testimony is insufficient to satisfy the General Counsel's burden to prove the elements of an 8(b)(1)(B) violation by a preponderance of the evidence.

Two weeks later, Burzynski filed disciplinary charges against Podewils, and Respondent then fined Podewils.

Based on these facts, as found by the judge, it is clear that Respondent: (1) was seeking to organize the Employer's employees (i.e., seeking to establish a collective-bargaining relationship; (2) was seeking to use Podewils as its organizer; and (3) disciplined Podewils because he refused to go along.

As to point 3, Respondent argues that it disciplined Podewils simply because he was working for a nonunion firm. However, the facts show that Local 494 Business Representative Burzynski filed his intraunion disciplinary charges against Podewils only 2 weeks after Podewils rejected Burzynski's request that Podewils organize Nell. As the judge noted, Burzynski's question to Podewils belied Burzynski's testimony that he went to Nell's premises simply to verify the accuracy of the tip he had received that Podewils was working for the nonunion Nell. Nor did Burzynski tell Podewils that he was impermissibly working for a nonunion employer or ask him why he was doing so. I also note the judge's finding that Burzynski's attempt to explain away his damaging inquiry was "lame." ("I felt I needed a reason to be there and that was a legitimate question.") If the Union's real intent had been simply to charge Podewils with violating its constitution (by working nonunion), rather than to pressure him to help in organizing, it could have verified his employment at Nell with a simple phone call. Further, Burzynski's giving Podewils his business card with his home telephone number written on the back is logically explicable as an action taken in the hope that Podewils would change his mind (or have it changed for him by the subsequent discipline). In any event, this action by Burzynski is not consistent with the notion of merely verifying employment.

My colleagues say that Burzunski, when speaking to Podewils, did not link Podewils' refusal to organize to any impending discipline. They also say that there was no mention of retaliation when the reference to organizing was made. From these observations, they conclude that the discipline was not motivated by the refusal to organize. I disagree with this reasoning. It is the rare case when a party (union or employer) admits motive to the victim. Rather, as in any other "motive" case, the result turns on an analysis of all the circumstances. As set forth above, I believe that the circumstances clearly support a finding of improper motive. In this regard, the finding is not based "simply" on the fact that Burzynski went to see Podewils in person and left him his business card. Nor is it "solely" based on the fact of Burzynski's inquiry to Podewils about organizing. Rather, my view is based on the totality of the circumstances.

I also note Burzynski's testimony that if Nell were organized, he would not have filed charges against Podewils. My colleagues seek to explain away that testimony. They say that if Nell were organized, i.e., if it were unionized, Podewils would no longer be working for a nonunion company. If that testimony were the only piece of relevant evidence, I might agree with them. However, in all the circumstances of the instant case, set forth above, I would not give the most innocent conceivable interpretation to that testimony.

Nor do I agree with my colleagues that this case can accurately be described as one in which enforcement of union rules has had merely the incidental *effect* of making a supervisory position less desirable. As discussed above, *the purpose* of the fine was to coerce Podewils to help Respondent Local 494 in its effort to organize Nell. That purpose was clearly contrary to what Nell wanted and expected from its manager-representative. I therefore agree with the judge's finding that the fine was intended to adversely effect Podewils in the performance of his Section 8(b)(1)(B) duties.

Accordingly, the requirement of *Royal Electric* (union has, or is seeking, a bargaining relationship) is satisfied.

Miann B. Navarre, Esq. and *Joyce Ann Seiser, Esq*., for the General Counsel.

Matthew Robbins, Esq. and *Jonathan M. Conti, Esq. (Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.),* of Milwaukee, Wisconsin, for Local 494.

Elihu I. Leifer, Esq. (Sherman, Dunn, Cohen, Leifer & Yellig, P.C.), of Washington, D.C., for the International.

Kevin J. Kinney, Esq., and *Heather L. MacDougall, Esq. (Krukowski & Costello S.C.),* of Milwaukee, Wisconsin, for the Charging Parties.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On February 24, 1998, Respondent, International Brotherhood of Electrical Workers, Local 494 (Local 494 or Local) fined Charging Party, Joseph G. Podewils $100,000, ostensibly for working in a nonunion shop. On July 24, 1998, Respondent, International Brotherhood of Electrical Workers, Sixth District (International, the International Brotherhood of Electrical Workers being referred to as the Union) sustained the violations found by the Local, with one exception, but reduced the fine to $10,000, even though Podewils, he says, had resigned from membership in the Local. That the complaint alleges, violates Section 8(b)(1)(A) and (B) of the National Labor Relations Act, 1947, as amended, 29 U.S.C. § 151 et seq. Respondents claim that Podewils never resigned and that their fines were lawful.[1]

[1] The relevant docket entries are as follows: The charges were filed on May 27, 1998. The charge in Case 30–CB–4127 was amended on November 6, 1998; but the complaint was issued on August 13, 1998,

Jurisdiction is conceded. Charging Party, Gerald Nell Inc. (Employer), a Wisconsin corporation, has been operating as a contractor and developer based in Waukesha, Wisconsin. During the year preceding the issuance of the complaint, it purchased and received goods and services valued in excess of $50,000 directly from sources outside Wisconsin. I conclude that the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that both Respondents are labor organizations within the meaning of Section 2(5) of the Act.

In October 1997, the Employer, a nonunion firm, hired Podewils as a replacement for the manager of its electrical division. Mike Nell, its president, told Podewils that he must resign from Local 494. Podewils agreed, and, when Podewils called on October 20 to say that his then employer did not want 2 weeks' notice and that he was ready to start with the Employer, he added that he wanted to take the rest of the week off so that he could take care of various matters, including his resignation from Local 494. Podewils called in the middle of that week to advise that he had indeed resigned; and on October 27, Podewils reported to work, presenting Nell with an unsigned honorary withdrawal card from the Union and a resignation letter which read:

10–22–97

Attn–

IBEW Local 494

As of this date Oct. 22, 97, I am terminating all previous membership with Local 494 and the IBEW.

[sgd.] Joseph G. Podewils

Podewils testified that he mailed this resignation on October 22, but Local 494 denied that it ever received it. Instead, the Local insists that all that it ever received was an application for an honorary withdrawal card, a card that Podewils admitted that he originally, albeit mistakenly, filled out a form for. When Podewils was told by Nell that he had to resign, he went home and "carefully" examined the union constitution. Podewils testified that he did not know how to resign. All that he could find about "resignation" were provisions that pertained to withdrawal, which, as will be seen, had quite different ramifications. So, on October 22, Podewils went to the Local's office and, assuming (he testified) that the only way out of the Union was by "withdrawing," asked for a withdrawal card.[2] Local 494 business representative, Dave Miller, asked Podewils what he would be doing and where he was going. Podewils replied that the information was confidential. Although Miller had been informed of the rumor that Podewils was going to work for a nonunion employer and, thus, knew that a withdrawal card was not the proper procedure for that situation, Miller provided Podewils with paperwork to receive a withdrawal card. Contrary to the testimony of another Local 494 business representative, Leon Burzynski, no one advised Podewils that, by withdrawing, he would be violating the union constitution by working for a nonunion employer, such as the Employer, but by resigning, he would be free to work for anyone. The Local's witnesses uniformly testified that they had no duty to do so. All Podewils was told was that he would be relinquishing some of his pension credits; and he knew from reading the constitution (and he was also told by Local 494 business manager, Paul Welnak), that, by withdrawing, he was remaining subject to union charges, trial, and appropriate penalty.

Podewils signed an application for a withdrawal card, specifically checking the portion of the application which was for an honorary withdrawal card, which stated that it applied to members who retired from the trade or were unemployed, rather than a participating withdrawal card that was for members who retired from the trade, or were unemployed, or were going into management and desired to maintain membership in the Union. Podewils knew that he was going to remain in the trade, but nonetheless signed the back of an honorary withdrawal card and returned it to the clerk for processing.[3]

Later on October 22, after he had picked up the forms from Local 494 showing that he had withdrawn, Podewils talked with Roger Kastanak, an old acquaintance, to advise him that he had left his job and had taken a withdrawal card from the Local. Kastanak did not think that that was the correct procedure and asked his associate, Bob Mueller, to get on the phone. Mueller said that he had his employees resign either by mail or drop off the resignation at the Local. As a result, Podewils testified, he prepared the resignation letter, quoted above, and mailed it. Unfortunately, he mailed it by regular mail, so there is no proof, either a receipt by the post office or a return receipt by Local 494, to corroborate his oral testimony.

Burzynski found out that Podewils was working for the Employer. On February 6, 1998,[4] he charged that Podewils had violated five sections or subsections of the union constitution, all purportedly dealing with his work for a nonunion contractor. The hearing was set for February 18; and, instead of showing up and proving that he had resigned or even advising the Local that he had resigned, Podewils decided, with Nell's concurrence, not to attend the hearing because he was not a member of the Union. So there is nothing to show, at the beginning of the Local's disciplinary proceeding against him, that he was taking the position that he had resigned.

The next event was the hearing's aftermath, the February 24 finding by Local 494 of guilt and the issuance of a $100,000 fine, served on Podewils. Podewils sought Nell's assistance, and Nell referred him to his corporate counsel, Todd Esser.

and was not amended. This hearing was held in Milwaukee, Wisconsin, on April 22, 1999.

[2] Counsel for the International asked Podewils: "Why did you go down there and say to him ' need to sign a withdrawal card?" Podewils answered: "Because at that time I believed that that was what I was going to be processing and doing based on my interpretation of this constitution." I asked whether it was true that, when he went to the union, he did not say "I would like to resign," but said "I want a withdraw[al] card." Podewils agreed. No one objected or excepted to the following quotation read from Podewils' investigatory affidavit: "I went down to the union hall and I spoke to a male business agent about the fact that I needed a union withdrawal card."

[3] Podewils related that his visit to the Union occurred on 2 days. It seems more likely that he completed his application on 1 day, as Burzynski testified.

[4] All dates hereinafter refer to 1998, unless otherwise indicated.

Podewils met with him, explained his dilemma, and gave him (Podewils testified) a copy of his resignation letter, quoted above. Esser then referred Podewils to yet another attorney, an employment law specialist, George Erwin, with whom Podewils also consulted and also (Podewils testified) gave him a copy of the same resignation letter. Erwin then prepared an appeal for him to sign, which Podewils signed on March 4 stating, in part, as follows:

> That my continued membership in the Union is not voluntary. In October of 1997 I requested a termination of my membership status. In response, this Local required me to sign a withdrawal form which I signed under the reasonable expectation that I was ending my affiliation with the Union subject only to my vested pension rights. It is the apparent position of the Local Union that the requirement that I sign this form continued the Union's jurisdiction over me, my future employment endeavor and my obligation to comport with the Union Constitution including engaging in actions that they view as detrimental to their economic well-being. This requirement imposed on my separation from Union affiliation is unconstitutional, constitutes an unfair labor practice, violates my freedom of association, is penal in nature and tortiously interferes with my existing contract rights with my new employer.

This letter is based on facts which preceded Podewils' phone call with Kastanak and Mueller. The letter represents that Podewils "terminate[d] . . . [his] membership status." Conspicuously missing from the letter is the word "resign" or "resignation" or any of the facts that Podewils testified to relating to his actions *after* going to the Local's office to "withdraw." Missing was any reference to the act that Kastanak and Mueller believed so important that they advised Podewils to send in a specific letter to the Local advising that he resigned. Missing also is an allegation that Podewils followed that advice and sent the resignation. All that appears in this letter is that Podewils went to the Local's office and the Local forced him to take a "withdrawal," which Podewils conceded was erroneous, because he was not required to accept the withdrawal card. Indeed, in his phone conversation, Podewils never complained to Kastanak that he had been forced or misled into withdrawing. Rather, he told Kastanak that he thought that he was resigning. Indeed, his own testimony demonstrates that getting the honorary withdrawal card was his idea, and he knew that by so doing he was remaining attached to the Union and was "subject to charges, trial and appropriate penalty in accordance with provisions of" the union constitution. In sum, Podewils knew that he was receiving a voluntary honorary withdrawal and was not resigning from the Union.

It was that knowledge that he imparted to Erwin, and it was that representation that Podewils made in the March 4 letter that he signed. In another letter, dated March 30, sent by Erwin, the specific factual assumption is that Podewils withdrew (not resigned) from the Union. Thus, Erwin "once again reiterate[d] on behalf of Joe Podewils that he has previously stated his intention to withdraw of [sic] this Union" and asked the Union to provide the following:

> 1. Name, address and, if available, telephone number of all individuals who were previous members of the Local Union 494 who have withdrawn from active union membership, either voluntarily or involuntarily within the last two years.
>
> 2. With respect to all members who have withdrawn based on employment with a nonunion employer, all actions taken by Local Union 494 in regard to these employees including fines or other action taken.

Clearly, Erwin was under the assumption that Podewils had taken a withdrawal card and had not resigned. Had it been otherwise, Erwin would not have repeatedly used the word "withdraw" and would have attached a copy of the resignation letter to his earlier appeal. Podewils' testimony that he told Erwin that he had resigned and that he gave him a copy of the letter could not be true. The fact that Erwin was not called as a witness, nor was Esser, only reinforces the fact that Podewils never sent his letter to the Local. I reject the General Counsel's attempt to blame Erwin for the failure to reference the resignation.

The Local's procedure required that it obtain the approval of its membership for the issuance of any withdrawal card. Podewils' application was approved at a membership meeting held on November 6, 1997, and his honorary withdrawal card was mailed to him the next day. Although Podewils received it, he did nothing. In particular, he did not write to the Local or telephone to advise that he should not have been sent an honorary withdrawal card because he had resigned, yet another indication that he in fact did not resign.

The Local keeps records of all the resignations it receives, as well as all applications for honorary withdrawal cards. Membership action is required for the issuance of the cards, but is not for resignations. However, the Local's president reports to the membership at each membership meeting the names of the persons who have resigned. Podewils' application for a withdrawal card was received and acted on by the membership. There is no record that the Local received a resignation from him, although there are substantial records that it received resignations from others and reported them to the membership. Furthermore, there is nothing in the record that indicates that the Local has any proclivity to deny, no less than any experience in denying, resignation requests.[5] Accordingly, I find no evidence that Podewils resigned from the Local[6] or that the Local took any disciplinary action against him knowing that he

[5] In August 1998, while this proceeding was pending, the Local received a copy of Podewils' resignation letter; but Welnak did not process it. The lawfulness of not accepting the resignation at that time is not before me.

[6] I fully recognize that this finding may appear, on its face, troubling. As Podewils argues, he received the advice from Kastanak and Mueller, he told Nell that he had resigned, and he filed his resignation form with Nell. On the other hand, every time that Podewils had an opportunity to assert to the Local or the International that he had resigned, he did not do so—either when he received his withdrawal card, or the internal Union hearing was scheduled, or after it was held, in his appeals to the International. And despite Podewils' claim that all he received from his efforts was the loss of his pension, there was something to gain in the issuance of the withdrawal card: if his new job did not work out, he could return to membership in the Local without paying a new initiation fee.

had resigned. It follows that regarding the alleged violation of Section 8(b)(1)(A), the International did not violate the Act because there is no primary liability on the part of the Local, and because there is no proof that in the appeal to it the International had any notice from Podewils that he had resigned (or had attempted to resign). All there was in the record before it was that Podewils had applied for an honorary withdrawal card and then gone to work at a nonunion facility. On that basis, the International found that he had violated its constitution, although not in all the respects found by the Local's trial board, and reduced the fine.

The complaint also alleges that Respondents fined Podewils in violation of Section 8(b)(1)(B), which makes it an unfair labor practice for a union or its agents "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Burzynski testified that he received an anonymous tip in November 1997 that Podewils was working for the Employer, so Burzynski confronted Podewils there on December 1, 1997, by asking "what would be the opportunity of [Podewils] working to organize" the Employer. Podewils said that that would not happen there and would not be an option.[7] Burzynski gave Podewils his business card, with his home telephone number written on the back. On cross-examination, Burzynski admitted that, if the Employer were organized, he would not have filed charges against Podewils. What was left unsaid was that, if the Employer was organized, Podewils would no longer be working for a nonunion company.

Burzynski testified that his sole purpose of being at the Employer's premises was to ensure the accuracy of his information that Podewils was working there; but his question to Podewils belies that testimony. Burzynski testified that, when Podewils came to the Local's office to apply for his withdrawal card, he "reminded him that if he was going to stay in the electrical field that he . . . would not be able to be eligible to receive a withdrawal card." Instead of telling Podewils at the Employer's office that he was misusing his withdrawal card because he was not eligible for it, as (he testified) he had told him previously,[8] or asking what Podewils was doing there, after he had taken out a withdrawal card, Burzynski asked him to organize. What he was really doing was using Podewils' application for a withdrawal card to apply pressure to organize the Employer. And, when Podewils refused to commit himself, Burzynski filed his charges on December 15, 1997, later explaining to the trial board that Podewils had said that there was no chance that the Employer's electrical division would ever be unionized, that "Podewils has already been responsible for $268,000 of electrical work that should have been done union," that the "first objective [of the Union constitution] is to organize all electrical workers," and that Podewils's moving to the Employer "is in opposition to that" objective.

The following must be shown to establish an 8(b)(1)(B) violation: (a) that Podewils was engaged in 8(b)(1)(B) activities; (b) that Local 494 was seeking to unionize the Employer's employees; and (c) that the $100,000 fine was intended to adversely affect Podewils in the performance of his Section 8(b)(1)(B) duties. *NLRB v. Electrical Workers Local 340*, 481 U.S. 573, 585–589 (1987); *NLRB v. Electrical Workers Local 1547*, 971 F.2d 1435, 1436 (9th Cir. 1992), enfg. 300 NLRB 1065 (1990). Podewils was engaged in 8(b)(1)(B) activities. He was responsible for running the Employer's electrical division, doing his own estimating, purchasing his own materials, and scheduling his employees on a daily basis, deciding where they were going to go, who was going to work with whom, and how long they were going to be working there. He settled all grievances or disputes that arose among these employees, such as when one had a personality conflict with another employee (he moved Shaun Zaskowski, who had complained about another employee he was working with), when an employee wanted a day off, and when they felt they were not being paid properly (he granted pay increases to employees Zaskowski, Steve Roblee, and Roger Pozorski, after they complained about their pay rates). He had the independent authority to hire and fire, to give wage increases, and to lay off employees.[9] The Board has found, in *Plumbers Local 60 (ITMC Corp.)*, 299 NLRB 401 (1990), that supervisors' handling of payroll disputes in a nonunion operation were exactly the type of disputes that would most likely be contractual grievances if a collective-bargaining agreement had been in place.[10] See also *Electrical Workers 1547 (Veco, Inc.)*, 300 NLRB 1065 (1990).

Despite that fact that, here, there is no strike, stoppage, direct demand for recognition, or other evidence frequently relied on by the Board to find violations, one cannot disregard what Burzynski said to Podewils when they met at the Employer's

[7] This is Podewils' recollection. Burzynski's was not much different: In his statement to the Local's trial board, he stated that he asked if there was any possibility of the Employer's electrical division becoming Union. Podewils said: "No. I don't think so," and Burzynski replied: "I'm sorry about that. I'm disappointed."

[8] Burzynski's failure to say this (as well as the fact that none of Burzynski's notes support such a conversation) makes me disbelieve that testimony. In addition, I find lame his attempt to explain away his damaging question asking Podewils to organize for him: "I felt I needed a reason to be there and that was a legitimate question." As shown, above, Burzynski could have legitimately mentioned Podewils' violation of the conditions of his withdrawal card. Finally, as the counsel for the General Counsel points out in her brief, if the Local's real intention was to charge Podewils with a violation of the Union constitution, rather than retaliating against him for not assisting in organizing, it could have verified Podewils' employment at the Employer by a quick phone call after learning, as Burzynski testified that he did, that Podewils was employed there the first or second week of November 1997. Finally, I find that Burzynski's giving Podewils his business card was not an empty gesture. Podewils had the opportunity to call Burzynski, in case Podewils changed his mind.

[9] He had no authority, however, to change benefits which applied generally to not only the employees in his department but also the other employees of the Employer.

[10] Because the Employer hired Podewils as a supervisor and he had not resigned from membership in the Union, Podewils was not an employee within the meaning of Sec. 8(b)(1)(A) of the Act from the date that he first reported to the Employer. Local 494 agrees that he was a supervisor, but disagrees that he was an 8(b)(1)(B) grievance adjuster. Despite the fact that Podewils had not, until later, exercised any of the powers that he had to adjust grievances, Nell, when he hired Podewils, had invested him with those grievance-adjustment powers and functions by giving him full charge of his own crews.

office. Burzynski asked Podewils to organize the employees, a specific statement indicating the Local's concrete interest in representing the Employer's employees. *Plumbers Local 597 (Songer Corp.)*, 308 NLRB 733, 733–734 (1992). When Podewils refused, Burzynski filed his charge against Podewils. The union constitution provided that a withdrawal card could be annulled for working with nonmembers of the Union to perform electrical work, a remedy that Local 494 never even considered. Instead, the pressure that was intended to be applied was not a mere slap on the hand. The Local's fine was well in excess of Podewils' yearly salary as a supervisor. Certainly, it was 10 times as much as the International finally agreed on appeal was a reasonable amount for discipline. It may fairly be asked the reason for such a fine, if not to coerce Podewils to do something for the Local, and that was to help the Local in organizing, an effort that was obviously contrary to what the Employer wanted when Nell demanded that Podewils resign from the Local. In this sense, I find that the $100,000 fine was intended to adversely affect Podewils in the performance of his 8(b)(1)(B) duties. Accordingly, I conclude that Local 494 violated the Act.

I do not find that the International is liable for the Local's violation. The International and Local 494 are separate entities and the International is not automatically responsible for the acts of its affiliate. *Coronado Co. v. Mine Workers*, 268 U.S. 295, 299 (1925), *Electrical Workers Local 5 (Franklin Electric)*, 121 NLRB 143, 146–148 (1958). The Employer and Podewils rely on a theory of agency to hold the International responsible. Their citations[11] deal solely with situations in which the local or locals were helping to administer contracts that had been entered by the certified bargaining agent, the higher union body. Here, there is no basis for finding that the International had knowledge that the appeal was based on anything other than Podewils's alleged resignation. Thus, liability under *Plumbers Local 589 (L & S Plumbing)*, 294 NLRB 616, 621 fn. 1 (1989); and *Bricklayers (McCleskey Construction)*, 241 NLRB 898, 899 (1979), cited by the Employer and Podewils, is unwarranted.

[11] *Reading Anthracite Co.*, 326 NLRB 1370 (1998); *Mine Workers District 17 (Joshua Industries)*, 315 NLRB 1052, 1063–1064 (1994), enfd. mem. 85 F.3d 616 (4th Cir. 1996); *United Mine Workers (Garland Coal)*, 258 NLRB 56, 59 (1981), enfd. 727 F.2d 954 (10th Cir. 1984).

REMEDY

Having found that Local 494 has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that Local 494 rescind and remove from its records all disciplinary action brought against Podewils, including refunding to him any fines that have been paid to the Local,[12] with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and notify Podewils that this has been done. I shall also recommend that Local 494 make Podewils whole for all legal and other expenses he incurred as a result of Local 494's unfair labor practice. *Operating Engineers Local 150 (Harsco Corp.)*, 313 NLRB 659 fn. 3 (1994), enfd. 47 F.3d 218 (7th Cir. 1995). Finally, I shall also recommend that the Local request the International to rescind its approval of Local 494's discipline of Podewils and remove all references to such discipline from its records.[13]

[Recommended Order omitted from publication.]

[12] Podewils has been paying Local 494 $40 each month.

[13] After the hearing, the International moved for admission into evidence its Exhs. 1–5. There being no opposition, the motion is granted.